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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/706,336

11/12/2003

Mark Weber

NOVA 9250

6814

1338

7590

11/15/2006

KENNETH H. JOHNSON

P.O. BOX 630708

HOUSTON, TX 77263

EXAMINER

CHEVALIER, ALICIA ANN

ART UNIT

PAPER NUMBER

1772

DATE MAILED: 11/15/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/706,336

Applicant(s)

WEBER ET AL.

Examiner

Alicia Chevalier

Art Unit

1772

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 9/5/06.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-3 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-3 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                        | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)    | Paper No(s)/Mail Date. _____  |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____   | 6) <input type="checkbox"/> Other: _____                                    |

## **RESPONSE TO AMENDMENT**

1. Claims 1-3 are pending in the application.
2. Amendments to the claims, filed on September 5, 2006, have been entered in the above-identified application.

### ***REJECTIONS***

3. **The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.**

### ***Claim Rejections - 35 USC § 103***

4. Claims 1-3 are rejected under 35 U.S.C. 103(a) as being unpatentable over Whetten et al. (U.S. Patent No. 5,804,660) in view of deGroot et al. (U.S. Patent No. 5,747,594).

Whetten discloses a container (*col. 2, lines 2-7*) having a nominal volume of 100 mL to 12 L (*col. 2, line 5, 16 ounces is equivalent to 473 mL and 1 gallon is equivalent 3.8 L*) prepared by injection molding (*col. 1, line 48*) of ethylene copolymer (*col. 1, lines 20-28*). The ethylene copolymer resin is characterized by a density from 0.950 g/cc to 0.955 g/cc (*col. 10, lines 21-25*) and a viscosity less than 3.5 Pascal seconds (*col. 7, lines 32-35, 0.01 kpoise is equivalent to 1 Pascal second and 15 kpoise is equivalent to 1500 Pascal seconds*) and a molecular weight distribution from 2.2 to 2.8 (*col. 8, lines 60-62*).

Whetten fails to disclose the Vicat softening point and the hexane extractable content.

deGroot discloses ethylene copolymer for food storage containers (*col. 1, lines 30-35*) exhibiting a low hexane extractives and a high Vicat softening point (*col. 2, lines 10-41*). A high Vicat softening point promotes heat resistivity and are more economically prepared (*col. 2, lines 4-20*). A low level of hexane extractives indicates a lower tendency for low molecular weight impurities or polymers fractions to migrate into sensitive packaged goods such as foodstuffs in food contact applications (*col. 1, lines 49-53*).

Therefore, the exact Vicat softening point and hexane extractable content of the contained is deemed to be a result effective variable with regard to the heat resistivity. It would require routine experimentation to determine the optimum value of a result effective variable, such as Vicat softening point and hexane extractable content, in the absence of a showing of criticality in the claimed Vicat softening point and hexane extractable content. *In re Boesch*, 205 USPQ 215 (CCPA 1980), *In re Woodruff*, 16 USPQ2d 1934, 1936 (Fed. Cir. 1990). One of ordinary skill in the art would have been motivated by have a high Vicat softening point and a low level of hexane extractives in order to promotes heat resistivity and are more economically prepared (*col. 2, lines 4-20*) and lower the tendency for low molecular weight impurities or polymers fractions to migrate into sensitive packaged goods such as foodstuffs in food contact applications (*col. 1, lines 49-53*).

The combination of Whetten and deGroot disclose all the limitations of the ethylene copolymer used to make the container. Therefore, the claimed average test drop height point value and total impact energy required for wall failure is deemed to be inherent, unless Applicant presents evidence from which the Examiner could reasonably conclude that the claimed product differs in kind from those of the prior art.

***ANSWERS TO APPLICANT'S ARGUMENTS***

5. Applicant's arguments in the response filed September 5, 2006 regarding the 35 U.S.C. 103(a) rejection over Whetten in view of deGroot of record have been carefully considered but are deemed unpersuasive.

Applicant argues that while it has previously been possible to produce injection molded polyethylene containers with a high stiffness, these stiff/rigid containers of the prior art are comparatively brittle and do not exhibit the high drop strength containers of the present invention.

Applicant has not presented evidence from which the Examiner could reasonably conclude that the prior art product does not have a high drop strength. Where the claimed and prior art products are identical or substantially identical in structure or composition, or are produced by identical or substantially identical processes, a *prima facie* case of either anticipation or obviousness has been established. Therefore, the *prime facie* case can be rebutted by evidence showing that the prior art products do not necessarily possess the characteristics of the claimed product. Therefore, the claimed average test drop height point value and total impact energy required for wall failure is deemed to be inherent, since the combination of Whetten and deGroot disclose all the limitations of the ethylene copolymer used to make the container.

Applicant argues that Whetten encompasses a narrow molecular weight distribution. This is irrelevant since Whetten's range overlaps Applicant's claimed range.

Applicant further argues that the impact modifier must have a very low density. However, the examiner is unable to find support for Applicant's argument in the disclosure of Whetten.

Applicant also argues that Whetten does not teach or suggest the criticality of using an overall I/M composition with a density of from 0.950 to 0.955 g/cc. Whetten does not have to teach that a density of 0.950 to 0.955 g/cc is critical. The burden is on Applicant to provide evidence that Whetten does not necessarily possess the characteristics of the claimed product.

### ***Conclusion***

6. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Alicia Chevalier whose telephone number is (571) 272-1490. The examiner can normally be reached on Monday through Friday from 8:00 am to 4:00 pm.


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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Harold Pyon, can be reached on (571) 272-1498. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

ac

11/13/06



**ALICIA CHEVALIER**  
**PRIMARY EXAMINER**